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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOHN KOCKOS, **Plaintiff and Respondent,** **v.** **JAMES GARDNER,** **Defendant and Appellant.**	**A098589/A100064** **(San Mateo County Super. Ct. No. 399593)**

Defendant/appellant James Gardner appeals the judgment[1] following court trial in favor of plaintiff/respondent John Kockos in Kockos's action for breach of a promissory note. Gardner primarily contends that the conditions precedent to payment of the note did not occur.

BACKGROUND

In the spring of 1995, Kockos, a real estate broker, contacted Gardner, a real estate developer, to inquire if he would be interested in purchasing as an investment a 56 unit residential building in which the individual units had been approved to be sold as condominiums. Kockos was not the listing agent handling the sale of the building. The building is commonly referred to as 324 Catalpa.

By letter of May 19, 1995, Gardner, an Iowa resident, replied that he would enter a purchase contract on certain conditions, one of which was the sale of 14 units at specified

[1] As explained, *post*, there were two judgments, substantively identical. Gardner appealed both of them, and we granted his unopposed motion to consolidate the appeals.

prices within 60 days of entering the purchase contract, with Kockos and another realty company to be the realtors who would handle the sale of the units. Although he did not list it as a condition, Gardner's letter also commented that he would "want the realtor's commission on the initial purchase to be left in the deal until the first 14 presales have been completed." At trial, Gardner testified that withholding payment of the realtor's commission until 14 units were sold was "security" that the project in which he was investing--selling the individual units of 324 Catalpa as condominiums--would be a success.

By facsimile on May 19, 1995, Kockos responded, inter alia, that "as for my share of the commission, I have no problem working this into the overall project, provided I get at least a small part upon initial close, i.e., at least 1/5."

Gardner alone executed the $3,937,000 initial purchase contract, but he and another investor, Richard Chun, took title to 324 Catalpa, with escrow closing on September 1, 1995. Kockos shared the $240,000 commission on the sale equally with the listing agent.

Also on September 1, 1995, Gardner executed a one-year promissory note of $100,000 to Kockos. The note stated that it represented "postponement of commission earned regarding" the sale of 324 Catalpa. The note's maturity date would "accelerate thirty days following net proceeds of $3,000,000[] payable to the owners on sales at condominiums" at 324 Catalpa.

Kockos testified that in a simultaneous transaction he was paid $120,000 as a commission for the sale of 324 Catalpa; he agreed to lend Gardner $100,000; and he authorized the title company handling the escrow to wire-transfer $100,000 of his commission to Gardner's account in Iowa. He never had the $100,000 physically in hand.[2] Kockos also testified that he understood the $3,000,000 "net proceeds," as used in the September 1, 1995 promissory note, to mean the amount remaining from condominium sales at the close of their escrows after such attendant expenses as closing

[2] Kockos presumably was actually handed the other $20,000 of his commission. He was not asked at trial why Gardner wanted a loan, and the escrow instructions are not in the record.

costs, recording fees, and title insurance, but not outstanding liens or debt obligations, had been subtracted from total sales.

Gardner testified that he received $100,000 at the close of escrow, but he characterized the sum as representing his original understanding that Kockos would leave his commission with Gardner as "reassurance" for the success of the condominium project. He also testified that he did not need an "assignment" of Kockos's $100,000 commission to purchase 324 Catalpa. Gardner further testified that he understood $3,000,000 "net proceeds," as used in the 1995 promissory note, to mean "net profits," i.e., total condominium sales minus his purchase price for 324 Catalpa and related expenses.

In October 1995, title to 324 Catalpa was transferred to a limited liability company called the Cherdon Company, which had been organized by Gardner and Richard and Opal Chun.

On May 29, 1996, Kockos executed a 60 day exclusive listing agreement with the Cherdon Company to sell the individual units at 324 Catalpa as condominiums. Several offers were made during the listing period, but no sales closed.

On the morning of September 13, 1996, Gardner, on behalf of the Cherdon Company, and Kockos executed a "Settlement Agreement Between Parties." The agreement permitted Kockos to close the sale of eight condominiums at 324 Catalpa and granted him a 60 day nonexclusive listing agreement. The purpose of the agreement was to settle all disputes between Kockos and the Cherdon Company concerning his right to an exclusive listing agreement.

According to Gardner's testimony, he and Kockos executed the settlement agreement at 324 Catalpa, where they discussed "how they would come to an agreement" regarding Kockos's outstanding $100,000 commission. Gardner further testified that they decided Gardner would instruct the title company to pay Kockos $100,000 from escrow after there had been a $3,000,000 minimum in net sales of condominiums.

Later the same day, September 13, 1996, Gardner met Kockos at the office of the North American Title Company, at which a general escrow for 324 Catalpa had been

opened. Kockos presented him with a document entitled "Irrevocable Assignment of Escrow Proceeds" regarding 324 Catalpa (hereafter Irrevocable Assignment). The Irrevocable Assignment was directed to "North American Title Insurance Company" and states:

"THESE ARE MY IRREVOCABLE INSTRUCTIONS TO PAY OUT OF MY PROCEEDS FROM THE SALE OF THE CONDOMINIUMS AT [324 CATALPA], AFTER A MINIMUM OF $3,000,000.00 OF NET PROCEEDS HAS BEEN RECEIVED FROM CONDOMINIUM SALES, THE SUM OF $12,500.00 FROM EACH ESCROW CLOSING THEREAFTER, TO [KOCKOS] OR HIS ASSIGNS.

"'MY PROCEEDS' [ARE] THOSE FUNDS PAYABLE TO ME AND NOT TO OTHER INTERESTS IN CHERDON CO. LLC. As Mr. Kockos will be involved in some of the transactions, this is also my authority to keep him informed, upon his request, as to what the status of closings is until the full amount of $120,000 has been paid in full to him. After this amount has been satisfied, the only access to [escrows] as to Mr. Kockos[] will be those [escrows] that he is acting as an agent in.

"*This 'IRREVOCABLE ASSIGNMENT' is given to satisfy a promissory note, given this date, in lieu of a prior debt and other matters.*

"The undersigned, seller, indemnifies North American Title Insurance against any liability with regards to the above irrevocable assignment of proceeds, and is merely handling these disbursements as an accommodation." (Italics added.)

Gardner executed the Irrevocable Assignment as debtor, and Kockos "approved" it as "secured party." Gardner testified that when he asked Kockos the meaning of the italicized paragraph (commonly referred to as the "penultimate paragraph"), Kockos presented him with a new promissory note (the September 13, 1996 note). Gardner further testified that he did not understand "why [there] was any need for [a promissory] note," insofar as "I was signing a document [i.e., the Irrevocable Assignment] saying, it was satisfying the [September 13, 1996] note."

Gardner then executed the September 13, 1996 promissory note to which the Irrevocable Assignment referred. The September 13, 1996 note, prepared by Kockos,

was in the amount of $125,000 and payable to Kockos. It was secured by the above-quoted Irrevocable Assignment, and expressly cancelled the September 1, 1995 promissory note. The September 13, 1996 note was to be paid "as follows:

a - $5000.00 on or before 10/1/96.

b - $1,200.00 per month commencing 11/1/96 []

c - $12,500.00 from each closed escrow, per attached

'Irrevocable Assignment of Proceeds From Escrows' which agreement & instructions to North American Title Insurance become part of this promissory note. With the entire amount due and payable on or before six months from date of note."

The September 13, 1996 note also stated that "any default in any of the above terms will cause the entire sum of principal to become due and payable in full immediately," or if, inter alia, the Cherdon Company elected to change title companies and failed to provide similar irrevocable instructions to any new title company. Kockos testified that the amount of the September 13, 1996 note represented the $100,000 that was never paid on the September 1, 1995 promissory note, plus a "bonus" or "consideration" for the termination of his exclusive listing agreement to sell the condominiums.

Gardner testified that after a lengthy discussion at the North American Title Company office about the meaning of the September 13, 1996 note and Irrevocable Assignment, he agreed to give Kockos $5,000 to "handle sales" at 324 Catalpa. He further testified that "it was [] our understanding at that time, the note didn't mean anything, because it was being satisfied" by the Irrevocable Assignment.

On October 21, 1996, Gardner paid Kockos $5,000, as specified in part "a" of the September 13, 1996 note's payment schedule. He made no other payments on the note.

Kockos did not sell any condominiums after September 13, 1996.

In early February 1997, an offer was made to purchase 324 Catalpa as a single building, and procedures were commenced to effectuate the purchase. The prospective buyer made the offer through the auspices of a realtor different from Kockos.

On February 10, 1997, Kockos brought an action against the Cherdon Company. In a cause of action for breach of contract he alleged that on or about November 1996 the Cherdon Company failed to make required payments on the September 13, 1996 note. In a cause of action for quiet title he alleged that the Cherdon Company's claim to be sole owner of 324 Catalpa was subject to his right to an interest in the property "by way of payments owed [him] and Irrevocable Assignments of Escrow Proceeds."

Sometime between March 7, 1997, and early April 1997 Chicago Title replaced North American Title as escrow holder for the sale of 324 Catalpa. Chicago Title was not provided with an irrevocable assignment agreement comparable to the Irrevocable Assignment given to North American Title on September 13, 1996.

On April 9, 1997, the sale of 324 Catalpa as an apartment building closed; the sale price was $4,825,000. Kockos did not receive any commission on the sale.

In September 1998, Kockos amended his February 1997 complaint to drop the quiet title cause of action, add various tort causes of action, and add Gardner, Chicago Title, and Richard and Opal Chun as defendants. For purposes of this appeal, the gravaman of his causes of action against all parties except Chicago Title was that they failed to pay him the sums due under the September 13, 1996 note or failed to instruct Chicago Title to do so. His cause of action against Chicago Title alleged that it interfered with the September 13, 1996 note and Irrevocable Assignment by refusing to pay him the sums due thereunder. We affirmed the summary judgment entered in favor of Chicago Title and the Chuns on the amended complaint. (*Kockos v. Chicago Title Company et al.* (Apr. 3, 2001, A089473) [nonpub. opn.].)

Kockos subsequently dismissed the Cherdon Company from his action, leaving only Gardner as a defendant. Kockos's sole claim at trial was that Gardner had paid only $5,000 of the September 13, 1996 note, and the remaining $120,000 was overdue. Gardner's defense was that the conditions for payment of the note never occurred because the net proceeds from condominium sales at 324 Catalpa never reached $3,000,000.

Without issuing a tentative decision, the trial court entered judgment for Kockos on February 15, 2002, for $120,000, plus interest. The judgment did not designate the amount of interest or the judgment debtor. The judgment also stated that the "court finds that the reference to 3,000,000 was not a condition of the obligation for repayment but rather provided a mechanism for the acceleration of the payment schedule."

Thereafter, the court orally vacated the February 15, 2002 judgment because the procedures governing statements of decision (Code Civ. Proc., § 632; Cal. Rules of Court, rule 232) had not been followed. On August 2, 2002, it issued a statement of decision responding to questions posed by Gardner and entered a second judgment on August 2, 2002, again awarding Kockos $120,000, plus interest of $82,927.65, specifically against Gardner.

DISCUSSION

I. *Standard of Review*

The paramount rule governing the interpretation of contracts is to give effect to the mutual intention of the parties at the time the contract was executed, so far as it is ascertainable and lawful. The intention of the parties is first derived from the language of the entire contract, if possible. (Civ. Code, § 1639; *City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 382 (*City of Chino*).) However, parol evidence is properly admitted to construe a written instrument when its language is ambiguous. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage Etc. Co*. (1968) 69 Cal.2d 33, 37.)

Whether to admit parol evidence to aid interpretation of a contract is a two-step process. The trial court first receives, but does not actually admit, all credible evidence regarding the parties' intentions to determine if the contract contains ambiguities, i.e., if its language is reasonably susceptible to the interpretation urged by one party. If the court decides the language is reasonably susceptible to the party's interpretation in light of the proffered extrinsic evidence, the court admits it to aid in the second step: interpretation of the contract. (*City of Chino, supra*, 97 Cal.App.4th at p. 383.)

The trial court's ruling on "ambiguity"--whether the proffered evidence is relevant to prove a meaning to which the language of the contract is reasonably susceptible--is a

question of law, and is thus subject to independent appellate review. (*City of Chino, supra*, 97 Cal.App.4th at p. 383.) Appellate review of the trial court's ultimate construction of a contract depends on whether the competent parol evidence admitted to aid the interpretation of a contract was in conflict. (*Ibid*.) If it conflicted, and thus required resolution of credibility issues, the reviewing court will uphold a reasonable construction of the contract if supported by substantial evidence. (*Ibid*.; *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.) If not, the reviewing court construes the contract independently. (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865-866 (*Parsons*).)

Here, we are not bound by the trial court's interpretation of the September 13, 1996 note and its incorporated Irrevocable Assignment because (1) the threshold determination of "ambiguity" is subject to de novo review, (2) the two documents, when read *together*, are ambiguous, but (3) the only conflicting extrinsic evidence was Gardner's testimony as to what he subjectively understood and intended the documents to mean. Evidence of a party's undisclosed subjective intent is not competent extrinsic evidence because it is irrelevant to determine the meaning of contractual language. (*Brant v. California Dairies, Inc*. (1935) 4 Cal.2d 128, 133; *Blumenfeld v. R.H. Macy & Co*. (1979) 92 Cal.App.3d 38, 46.) Furthermore, where evidentiary facts are undisputed, and only the inferences to be drawn from them are disputed, an appellate court construes written language independently. (*Parsons, supra*, 62 Cal.2d at p. 866, fn. 2; *Okun v. Morton* (1988) 203 Cal.App.3d 805, 816.)

II. *September 13, 1996 Note and Irrevocable Assignment*

Under fundamental rules of contract interpretation, courts look first to the words of the contract to derive the parties' mutual intent. If the language is clear, explicit, and does not involve an absurdity, it governs the interpretation. (Civ. Code, §§ 1636, 1638.) The words are to be understood in their ordinary and popular sense. (Civ. Code, § 1644.)

The language of the September 13, 1996 note, standing by itself, is straightforward and readily manifests the parties' intent. The note clearly identifies the exact amount owed: $125,000; the date the entire amount is due: "six months" from the date of note,

i.e., March 13, 1997; and the payor and payee: Gardner and Kockos, respectively. It contains a schedule for periodic payments: $5,000 due by October 1; $1,200 due each month starting November 1; and $12,500 from each closed escrow, "per [the] attached" Irrevocable Assignment, but also provides that the entire sum will be due immediately if certain contingencies occur, e.g., default in the payment schedule. By contrast, the note contains no conditions that would relieve Gardner from paying the note. The patent intent of the note is that Gardner was obligated to pay Kockos the entire sum of $125,000 no later than March 13, 1997.

Gardner contends that the note incorporates the Irrevocable Assignment, and that the penultimate paragraph of the Irrevocable Assignment--providing that it "is given to satisfy" the September 13, 1996 note--was intended to cancel or extinguish the September 13, 1996 note. Therefore, he argues, he was not obligated to pay Kockos $125,000 until he received a minimum of $3,000,000 in net proceeds from condominium sales at 324 Catalpa, which never happened.

We agree that the September 13, 1996 note cannot be construed in isolation. It specifically states that Gardner's instructions to North American Title contained in the Irrevocable Assignment "become[] part of this promissory note." Nevertheless, Gardner's contention is unavailing.

Courts are required to interpret the entire contract so as to give force and effect to every provision thereof, not to interpret it in a manner that renders some of its clauses nugatory, inoperable or meaningless. (*New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, 81; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 473.) Gardner's interpretation of the Irrevocable Assignment's penultimate paragraph is contrary to this rule of contract interpretation. His interpretation would effectively nullify the entire September 13, 1996 note, making its drafting and execution nothing but a pointless exercise. To interpret the Irrevocable Assignment, drafted and executed simultaneously with the note, as immediately extinguishing the note is not reasonable. (See Civ. Code, § 3542: "interpretation must be reasonable.") Moreover, as a real estate developer, Gardner cannot be considered unsophisticated in

financial transactions. Had the parties intended that Kockos would not be entitled to payment of the $125,000 until Gardner received net proceeds of $3,000,000 from condominium sales, they could easily have drafted the note to include such a contingency. In fact, Gardner's own act of paying $5,000 on the note before any condominiums were sold belies his argument that he was not obligated to make any payments on it until condominium sales totalled $3,000,000.

Additionally, the September 13, 1996 note states in two places that it is "secured" by the Irrevocable Assignment, which Kockos "approved" as the "secured" party. The ordinary meaning of "secured" or "security" in the context of a financial transaction is something given or pledged to make certain the fulfillment of an obligation. (Webster's 10th New Collegiate Dict. (2001) p. 1053). The obligation remains until it has been satisfied, i.e., discharged. (Webster's 10th New Collegiate Dict. (2001) p. 1035.) Gardner has never asserted that he fulfilled his obligation to pay Kockos the entire $125,000. Consequently, the Irrevocable Assignment cannot be construed as canceling the note for which it was given to make Gardner's payment of that note certain.

Finally, while the September 13, 1996 note specifies that the Irrevocable Assignment is a part of it, the Irrevocable Assignment itself is actually a set of instructions to North American Title regarding the distribution of escrow proceeds. North American Title has no beneficial interest in Gardner's debt to Kockos. Therefore, the word "satisfy," as used in the Irrevocable Assignment's penultimate paragraph ("this 'irrevocable assignment' is given to satisfy a promissory note"), is most logically read as Gardner's explanation to North American Title for his instruction to distribute a portion of his escrow proceeds to Kockos: to discharge an obligation he has to Kockos. The fact that Gardner explained to North American Title his reason for having escrow proceeds from condominium sales distributed to Kockos does not cancel his promise to pay Kockos the full amount of the note by a specific date.

Statement of Decision

Gardner contends the judgment must be reversed because the trial court's statement of decision failed to explain the factual and legal bases for the principal

controverted issues concerning the September 13, 1996 note and the Irrevocable Assignment.

Statements of decision are required as to issues of fact decided by the trial court, not as to issues of law. (*City of Coachella v. Riverside County Airport Land Use Com*. (1989) 210 Cal.App.3d 1277, 1291-1292.) The parties' ultimate dispute centered on the meaning of the September 13, 1996 note and its incorporated Irrevocable Assignment. When, as here, the competent extrinsic evidence did not conflict, the interpretation of those writings was a question of law for the trial court, and this court interprets the writings de novo. (*Parsons, supra*, 62 Cal.2d at pp. 865-866.) Therefore, the contents of the statement of decision does not bear on our review; Gardner cannot demonstrate prejudice even if the decision's analysis and summary of supporting evidence are not as thorough as he contends they should have been. (Cal. Const., art. VI, § 13.)

In any case, courts are required by Code of Civil Procedure section 632 to state ultimate, not evidentiary, facts in a statement of decision. Reversible error results only if the court fails to make findings on a material issue that would fairly disclose the trial court's determination. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) "'Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis for the court's decision regarding the principal controverted issues at trial as are listed in the request.' [Citation.]" (*Ibid*.).

The statement of decision comports with these requirements. The trial court answered each of Gardner's seven proffered questions, and its answers both address the principal controverted issues and explain the bases of its decision.

Responding to Gardner's specific inquiries, the trial court concluded (1) the September 13, 1996 note was not ambiguous regarding the conditions of payment, and Gardner had not complied with those conditions; (2) the Irrevocable Assignment was not

ambiguous regarding conditions of payment of the September 13, 1996 note and constituted "merely" another source of payment for the note; (3) the two documents read together were not ambiguous as to conditions for payment because the note expressly stated the terms for payment, and the Irrevocable Assignment was an alternative source for payment; (4) whether Gardner reasonably believed payment of the September 13, 1996 note was contingent on $3,000,000 net sale profits from condominiums was not related to the ultimate determination of whether nonpayment constituted a breach, and in any case the express terms of the note were such that he could understand them, and his partial payment of $5,000 implied he did not believe payment was contingent on net profits of $3,000,000; (5) the parties' intent as to the September 1, 1995 note was irrelevant because it was expressly cancelled by the September 13, 1996 note; (6) given the September 13, 1996 note's express terms, Gardner could only reasonably believe that it was binding, not that it was satisfied by the Irrevocable Assignment, and there was no compelling evidence to demonstrate otherwise; and (7) whether Gardner believed Kockos understood payment of the note to be contingent on $3,000,000 net profits was irrelevant to the court's decision.

Gardner may disagree with the court's conclusions regarding lack of ambiguity in the two writings that were at the heart of the parties' dispute, but his disagreement does not result in an erroneous failure of the statement of decision to explain the factual and legal bases of the court's decision. (See *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

III. *Loss of Jurisdiction*

Gardner contends the February 15, 2002 judgment was voidable, and therefore the trial court lacked jurisdiction to dismiss it and enter the August 2, 2002 judgment and accompanying statement of decision. He appears to argue that this court must therefore disregard all trial court proceedings after February 15, 2002, and reverse the February 15 judgment because the court entered it without first issuing a statement of decision.

This case had a tortuous post-trial history, which we recite in detail to demonstrate the absence of prejudicial error. Trial was held over four days in November 2001.

During the course of trial the court stated its tentative conclusions as to certain issues, and noted that the parties could incorporate its conclusions "in what I ask you to write, when we're finished."[3] After the parties rested, the court stated, inter alia, that "the question is[] the $125,000.00 note and . . . I'll give you each something to work on with respect to that. [¶] But in terms of the issue and the questions, you work that out between yourselves without regard to the timing of the transcript." It instructed the parties to stipulate to a written closing argument briefing schedule, and "when you do that, also provide me with the understanding of the issues and the questions that you're going to want me to decide, and the bases for your contention that I should decide it in your favor or not."

Thereafter, the parties stipulated that on "the issue of the note, the questions are (1) is the September 13, 1996 note due and payable, and (2) if so, then what is the amount due."

Gardner's closing argument observed, inter alia, that the court was "not bound by any preliminary expressions it made during trial before the close of evidence, but rather is bound to a proper interpretation of the intent of the parties, and the determination of whether an ambiguity exists is one of law."

Kockos's argument encouraged the court to adhere to the statement it made during trial that payment of the September 13, 1996 note was not conditional on Gardner first receiving $3,000,000 net proceeds from condominium sales. He also enclosed with his January 3, 2002 reply argument a proposed judgment in his favor, with the amount of the judgment left blank. He copied these documents to Gardner.

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[3] For example, the court stated that it interpreted the penultimate paragraph of the Irrevocable Assignment "to mean that, the giving of the assignment was not meant to satisfy and extinguish a promissory note. [¶] Extinguish doesn't make any sense to have them both executed and one destroyed. What this was attempting to say, it occurs to me, [as] a reasonable interpretation, is that from the proceeds from this irrevocable assignment, the note would be satisfied. [¶] That meant . . . payment would be made pursuant to [the] irrevocable assignment. And if enough payment would be made, this would be satisfied, as we use it in a legal term."

The parties have not cited, nor have we found, any request for a statement of decision. On February 15, 2002, the court entered a judgment that awarded Kockos $125,000, less $5,000, plus interest. As previously noted, the judgment specified that the reference to $3,000,000 in the Irrevocable Assignment "was not a condition of the obligation for repayment but rather provided a mechanism for the acceleration of the payment schedule."

On February 25, 2002, Gardner requested a statement of decision, pursuant to Code of Civil Procedure section 632. He also requested vacation of the February 15 judgment, insofar as it was entered without service of a tentative decision, proposed statement of decision, or proposed judgment, in violation of California Rules of Court, rule 232.

On April 12, 2002, Gardner filed his appeal from the February 15 judgment (A098589). His designation of the record for this appeal includes a reporter's transcript for a hearing held the same day, April 12.

According to Gardner's attorney's opening remarks, the Friday, April 12 hearing was scheduled for a determination of attorney fees. His attorney also noted that the court had suggested the parties stipulate to vacating the judgment, so the court could "deal with" Gardner's request for a statement of decision, then enter a new judgment, after which a new period to appeal would commence. Kockos agreed to vacating the judgment solely to amend it to have Gardner the only defendant obligated on the judgment, and then immediately refiling it. Otherwise he objected to vacating it, arguing that the February 15 judgment complied with the requirements for a statement of decision because it contained the reason for the judgment, i.e., the Irrevocable Assignment's reference to $3,000,000 not being a condition for repayment. Gardner responded that the absence of a statement of decision alone was an "appealable issue," which could be eliminated by vacating the judgment and following the proper procedures for a statement of decision.

The court orally vacated the judgment and announced it would comply with Gardner's request for a statement of decision, which it would "have . . . out next week."

Gardner's attorney then stated: "And as I indicated in our discussions prior to the hearing . . . I have, in fact, filed a notice of appeal, which the clerk tells me, I can withdraw." He recapitulated the day's proceedings: "We've all agreed that . . . the judgment shall be vacated[.] [¶] So that there will be no prejudice to [Gardner's] withdrawing [his] notice of appeal . . . from the appeal clerk [which was filed today, out of an abundance of caution because April 15, 2002 is the final day to notice an appeal] and so now, we need to await your honor's decision on the statement of decision. . .following the procedural statute[s] regarding statements of decisions and judgments."

On July 5, 2002, we received the record from the appeal from the February 15 judgment (A098589) and notified Gardner that his opening brief was due in 30 days. On July 19, 2002, Gardner filed a motion to augment the record and requested an extension of time to file his opening brief. The augmented record contains:

Exhibit A: Kockos's March 22 proposed statement of decision, served on Gardner;

Exhibit B: the court's April 19 tentative decision, stating only that judgment is to be entered in favor of Kockos in the amount of $125,000 minus $5,000, and Kockos will prepare a statement of decision if requested;

Exhibit C: a May 20 letter from Kockos's attorney to the trial court, stating that, pursuant to their May 17 conference, he was enclosing a proposed judgment of $120,000, plus $81,870.90 interest;

Exhibit D: a May 21 letter from Gardner's attorney objecting to the judgment because Kockos had not yet prepared a statement of decision, as the court directed at the May 17 conference;

Exhibit E: a June 4 order vacating the May 21 judgment;

Exhibit F: Kockos's "amended proposed statement of decision, served June 17"

Exhibit G: Gardner's June 18 "Brief re Statement of Decision" arguing the court had no jurisdiction to vacate its February 15 or May 21 judgments, as it did, sua sponte, and moving for vacation of the February 15 judgment and entry of judgment in his favor;

Exhibit H: a June 17 declaration of Gardner's attorney stating, inter alia, that Kockos's March 22 proposed statement of decision did not address the seven issues

designated in Gardner's February 25 request for a statement of decision, that he advised the court on April 15 that he would not withdraw his appeal filed April 12, and that he advised the court on May 17 that its error in entering the February 15 judgment without a statement of decision could not now be cured because of the pending appeal;

Exhibit I: Gardner's June 17 objections to Kockos's March 22 proposed statement of decision.

On August 12, 2002, we granted Gardner's motion to augment and denied his request for an extension of time to file his opening brief.

While Gardner's motion and request were pending in this court, the trial court, on August 2, 2002, issued an eight page statement of decision and entered a judgment for Kockos of $120,000, plus $82,927.65 interest.

On August 29, 2002, Gardner appealed the August 2 judgment. (A100064) On September 4 he moved this court, without opposition, to consolidate the two appeals. We granted his motion on October 2.

\Generally, of course, the perfecting of an appeal stays proceedings in the trial court on the judgment appealed from or the matters "embraced therein or affected thereby." (Code Civ. Proc., § 916, subd. (a).) Also, a trial court's failure to provide a statement of decision on the trial of a question of fact when a party has timely requested one is generally reversible error. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 232; *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127.)

However, Gardner cannot now complain of procedures he endorsed. A party seeking a statement of decision must make his or her request within 10 days after the court announces its tentative decision, which it may do orally. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 232(a).) Assuming (1) this was a trial "of a question of fact" obligating the trial court to announce a tentative decision, (2) the court's tentative conclusions announced during trial did not constitute a tentative decision, so (3) the parties were without a triggering date by which to request a formal statement of decision and thus (4) cannot be deemed to have waived their right to a statement, the trial court offered a remedy for its failure.

At Gardner's instigation, the court orally vacated the February 15 judgment in order to accommodate his request for a statement of decision. Without any contradiction from the court or Kockos, Gardner recited that the court decided to vacate the judgment, the parties and the court would follow the statutory procedural requirements for statements of decisions and judgments, and he would not be prejudiced by withdrawing the notice of appeal he had filed earlier that day.

For undisclosed reasons, Gardner elected not to withdraw his appeal after all. Thus, the trial court was arguably without jurisdiction to continue the statement of decision proceedings. Even if Gardner had apprised this court immediately after he filed his first notice of appeal, as by way of a petition for writ of supersedeas, that the trial court was continuing to act, our response could have been to grant the writ and issue a stay of all trial court proceedings pending resolution of the appeal from the February 15 judgment. Then, had we concluded the trial court erred in failing to issue a statement of decision, as Gardner urges, our disposition would simply have been to reverse the February 15 judgment with directions to the trial court to issue the statement of decision, with the case otherwise standing in the same posture as it occupied when the judgment was entered. (See *Miramar Hotel Corp. v. Frank B. Hall & Co*. (1985) 163 Cal.App.3d 1126, 1130.)

However, Gardner never requested this court to stay the post-appeal trial proceedings. Without objecting to this court that these proceedings had occurred, he brought some of them to our attention via his July 19 motion to augment, and the remainder of them via his September 4 motion to consolidate the two appeals. By the time of the motion to consolidate, the trial court had conducted the very proceedings we would have directed it to conduct had we reversed the February 15 judgment for lack of a statement of decision. Courts are not required to perform idle acts. (Civ. Code, § 3532.) Thus, no useful purpose would have been served had we (1) denied the September 4 motion to augment, (2) dismissed the appeal from the August 2 judgment because the trial court acted beyond its jurisdiction in issuing that second judgment and the August 2 statement of decision, then (3) reversed the February 15 judgment with directions to issue

a statement of decision, only (4) to have the trial court rubber stamp the August 2 statement of decision and judgment it had already issued, and (5) to have Gardner appeal a third time.

In fact, both the trial court and this court honored Gardner's essential requests: the trial court in issuing the statement of decision and this court in consolidating his appeals and augmenting the record with all requested documents. If we or the trial court erred in so doing, we did so at Gardner's invitation. By agreeing with--in fact, encouraging--the trial court's decision to vacate the February 15 judgment so it could issue a statement of decision, and then, apparently having changed his mind, taking no steps in this court to have those post-judgment proceedings stayed, Gardner is now estopped from asserting these errors as grounds for reversal. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685.) And, we reiterate, he cannot in any case demonstrate prejudice from them, because the trial court has now conducted all required proceedings and issued all required documents in granting judgment, and this court now has a complete record from which to review the propriety of that judgment.

DISPOSITION

The August 2, 2002 judgment supersedes the February 15, 2002 judgment and is affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.